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In The

Supreme Court of the United States

JOYTIME DISTRIBUTORS AND AMUSEMENT CO., INC.,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE STATE OF SOUTH CAROLINA SUPREME COURT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Did the court below infringe fundamental First Amendment freedoms of the South Carolina electorate by first enjoining the referendum on video gaming, and then itself deciding that such gaming should be outlawed?

2. Whether the United States Constitution requires, as a guarantee of a republican form of government, that all state legislatures have the power to refer acts to the electorate for the exercise of its veto power?

PARTIES TO THE PROCEEDING

Petitioner, Joytime Distributors & Amusement Company, Inc., is a corporation in good standing engaged in the video gaming industry pursuant to the laws of the State of South Carolina. Petitioner was plaintiff before the lower court in this action, the Supreme Court of the South Carolina. Respondent, the State of South Carolina, was a defendant in this action before the Supreme Court of South Carolina.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, petitioner declares that it has no parent companies or any wholly owned subsidies.

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OPINIONS BELOW

The decision of the Supreme Court of South Carolina in *Joytime Distributors & Amusement Co. v. State of South Carolina,* rendered on October 14, 1999, is unreported (*see* App. 1). Petitioner sought a rehearing of the case from the Supreme Court of South Carolina which was denied on October 20, 1999 (*see* App. 22). On January 7, 2000, upon obtaining new counsel, petitioner sought an extension of time for filing this Petition which was granted by this Court, giving petitioner until February 17, 2000 for filing of the Petition.

JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the Supreme Court of South Carolina on October 14, 1999 (*see* App.1). A petition for rehearing sought by petitioner was denied on October 20, 1999 (*see* App. 22). An extension of time for filing this Petition for Writ of Certiorari was granted to petitioner on January 12, 2000, setting February 17, 2000 as the deadline for filing the petition. The jurisdiction of this Court to review the opinion of the Supreme Court of South Carolina is invoked under 28 U.S.C. § 1257 (West 1999).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Republican Form of Government Clause of Article Four, Section Four, to the United States Constitution provides, in pertinent part, that: "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const., art. IV, § 4 (1999).

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall

make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend I (West 1999).

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const., amend. XIV, § 1 (West 1999).

The South Carolina Constitution states, in pertinent part, that: "All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government." S.C. Const., art. I, § 1 (1999). The South Carolina Constitution also states in Article III, in pertinent part, that: "The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'" S.C. Const., art. III, § 1 (1999).

Act 125, enacted during the 1999 South Carolina General Assembly, is also cited repeatedly throughout this Petition for Writ of Certiorari (*see* App. 23).

STATEMENT OF THE CASE

This case arises from efforts in the South Carolina General Assembly to abolish video gaming in South Carolina. During the entire course of the 1999 session of the General Assembly, efforts to abolish video gaming failed. By Executive Order 99-32, dated June 24, 1999, Governor Jim Hodges ordered the General Assembly to convene in special session and effectively held the General Assembly in session until a statute could be passed concerning video gaming. A Joint Committee of the House of Representatives and the Senate had developed a compromise bill which was, in various forms, repeatedly rejected in both the Regular

Session and the Special Session of the General Assembly. This compromise bill ultimately became Act 125 which was submitted to both the House and Senate and ratified on July 1, 1999. Act 125, as ratified, contained six parts. Part I prohibited cash payouts on video gaming devices as of July 1, 2000. Part II required that a referendum be held to put before the voters of the state a specific question to which the response would be "yes" or "no", stating: "Shall cash payouts for credits earned on video game machines continue to be allowed after June 30, 2000?" Part III provided a regulatory scheme for the video gaming industry to be put into effect if the referendum resulted in a majority "yes" vote. Part IV dealt with gambling losses and civil actions. Part V included a severability clause, savings clause and intent section. The legislative intent was "to allow an affirmative vote of the qualified electors of this State to serve as a trigger for the operation of the effective clause ...." (App. 130). Part VI is the "effective clause" mentioned in Part V and provides the effective dates upon which each section of the Act is to "take effect." Part I was to take effect on July 1, 2000. (*see* App. 130-131).

The precise language of the bill enacted by the South Carolina legislature:

> Referendum
>
> SECTION 9. (1) A statewide referendum must be conducted November 2, 1999, to ascertain whether or not video game machine payouts will continue to be allowed in this State. The State Election Commission shall place the exact question contained in item (2) of this subsection on the referendum ballot. The state election laws shall apply to the referendum, mutatis mutandis. The State Board of Canvassers shall publish the results of the referendum and certify them to the

> Secretary of State, the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Code Commissioner.
>
> (2) The question put before the qualified electors in the referendum shall read: "Shall cash payouts for credits earned on video game machines continue to be allowed after June 30, 2000?
>
> Yes [ ]
>
> No [ ]
>
> Those voting in favor of the question shall deposit a ballot with a check or cross mark in the square after the word 'Yes', and those voting against the question shall deposit a ballot with a check or cross mark in the square after the word 'No.'

The court below found in no uncertain terms that the legislature, by this bill, had attempted to transfer its legislative decision-making power to another body (the electorate), rather than deciding the video gaming issue for itself. *Joytime Distributors & Amusement, Co. v. South Carolina*, No. 25007, 1999 WL 969280 at (S.C. Oct. 14, 1999) (*see* App. 13). Indeed, that is precisely what Act 125 does: "A statewide referendum must be conducted November 2, 1999, to ascertain whether or not video game machine payouts will continue to be allowed in this State." The legislature wished to submit to the electorate the question of whether or not video gaming should continue to be allowed in the state, rather than decide that issue itself.

While the petitioner sought to have the statutory scheme declared illegal, the court below utilized the petitioner's challenge to engage in the very conduct to which petitioner objects; determination of a legislative matter by non-legislative means. By itself choosing that video gaming should be outlawed, the court below created a variant on the very issue it had addressed, may the legislative power be delegated to or assumed by the court in lieu of the referendum prescribed by the legislature? Resolution of this remedial determination, as with resolution of the case on its merits, implicates critical issues of separation of powers inherent in a republican form of government, as well as First and Fourteenth Amendment rights of South Carolina citizens.

Procedural Background

Petitioner, a corporation engaged in the video gaming industry and a licensed owner of 164 video gaming machines located in several South Carolina counties, sought a declaration as to the constitutionality of Act 125 in the Court of Common Pleas in Greenville County, South Carolina on September 2, 1999. Prior to the expiration of the time for answering the complaint, on September 17, 1999, the Attorney General for the state of South Carolina petitioned the Supreme Court of South Carolina to hear the case in its original jurisdiction.

By order dated September 24, 1999, the court granted the Attorney General's petition and ordered an expedited briefing schedule. The court also granted the petitions of PedroLand, Inc., a South Carolina Corporation that owns and operates Class III video gaming machines located in South Carolina, and of David H. Wilkins, Speaker of the South

Carolina House of Representatives, to appear as *amici curiae*.[1]

On October 14, 1999, the Supreme Court of South Carolina held that Part II of Act 125, providing for the referendum procedure, amounted to an unconstitutional delegation of power by the legislature to the voters of the state of South Carolina and thus, enjoined the referendum. *Joytime Distributors* at (*see* App. 13, 20). The court also found that the portions of Part III of the Act which provided for regulation of the video gaming industry, contingent upon the referendum in Part II, were also invalid. *Id.* at (*see* App. 17-18, 20). The court, exercising a severability clause contained in the Act (Part V, § 20), proceeded to hold that the portions of the Act which constituted an unconstitutional delegation of power were severable from the remainder of the Act, leaving Part I and Part IV as portions which were free-standing and could, therefore, be upheld. *Id.* at (*see*

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[1] The petitioner notes that, as a result of the way in which the court below decided this case, both petitioner and respondent have adopted positions in this Court which are at odds with the positions they took in the court below. Petitioner argues in this Petition for Writ of Certiorari that Act 125 was a valid exercise of the legislature's inherent legislative power, and that the decision of the court below unconstitutionally deprived both the legislature and the electorate of rights guaranteed by the First Amendment and the Guarantee Clause. Respondent, in its objection to petitioner's motion for an extension of time to file this Petition for Writ of Certiorari, now argues that the decision by the South Carolina Supreme Court finding Act 125's provision for referendum an unconstitutional delegation of legislative power should be upheld. A party's change in position during the course of a case does not necessarily defeat that party's standing to appeal, so long as a true case and controversy is involved. *See e.g., Bob Jones University v. United States*, 461 U.S. 574, 585 n.9 (1983) (allowing the Government to assert a position on review contrary to that which it had espoused in the courts below); *United States v. X-citement Video*, 513 U.S. 64, 78 (1994)). Since the decision of the court below outlaws petitioner's entire livelihood as of July 1, 2000, petitioner clearly did not prevail, assuring the case or controversy required by Article III for this Court to exercise jurisdiction over the matter.

App. 15-18, 20). The effect of the court's opinion was to decide for itself, contrary to the legislative intent, to outlaw video gaming in the state of South Carolina as of July 1, 2000. *Id.* at (*see* App. 17, 20).

Petitioner filed a petition for rehearing before the Supreme Court of South Carolina which was denied on October 20, 1999 (*see* App. 22). Petitioner then, upon obtaining new counsel, moved this Court for an extension of time to file the present Petition which was granted.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES AN IMPORTANT FEDERAL CONSTITUTIONAL QUESTION OF WHETHER THE COURT BELOW INFRINGED FUNDAMENTAL FIRST AMENDMENT FREEDOMS OF THE SOUTH CAROLINA ELECTORATE BY FIRST ENJOINING THE REFERENDUM ON VIDEO GAMING, AND THEN ITSELF DECIDING THAT SUCH GAMING SHOULD BE OUTLAWED.

James Madison clearly identified the fundamental tension, inherent in our constitutional system between the necessary delegation of power to government institutions and the retention of ultimate political authority in the people:

> If men were angels, no government would be necessary ... In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt the primary control of the government; but experience has taught

> mankind the necessity of auxiliary institutions.

Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11 (1997) (citing The Federalist No. 51 at 322 (James Madison) (Clinton Rossiter ed., 1961)). Among these institutions are the right to have laws passed by elected representatives, and the right to engage in the cluster of political freedoms - freedom of speech, press, assembly, and petition of the government for redress of grievances - contained in the First Amendment. On the other hand, judicial review also plays a critical role in maintaining the rule of law and the orderliness of all of these political institutions.

The question in this case is whether the court below exceeded the prerogatives of legitimate judicial review on an issue of intense political interest in South Carolina by depriving the electorate of that state of the ability to debate and vote upon the issue of video gaming. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *see Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.")

The cluster of fundamental First Amendment freedoms embodies the liberty interests of the individual, which may not be infringed by the state without very good cause. "The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). "The very

purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.... In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

This case pits the right of referendum against the power of judicial review. The legislature of South Carolina sought to submit the issue of video gaming to the electorate for a vote, but the court below deprived the electorate of that opportunity for debate and political change. As this Court has stated:

> [S]tatutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed. . . .The decision in *Posadas* does not suggest that "the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling."

Meyer v Grant, 486 U.S. 414, 423, 425 (1988) (citing 828 F.2d 1446, 1456 (10th Cir. 1987).

Although reasonable regulation is certainly necessary to insure the integrity of the referendum process, this Court has not been hesitant to utilize strict scrutiny to strike down those regulations which are not narrowly tailored to insure maximum protection of First Amendment political rights:

> As mentioned previously, in *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), we struck down Colorado's prohibition of payment for the circulation of ballot-initiative petitions. Petition circulation, we held, is "core political speech," because it

> involves "interactive communication concerning political change." First Amendment protection for such interaction, we agreed, is "at its zenith."

Buckley v. American Constitutional Law Foundation, Inc., 119 S. Ct. 636, 639-40 (1999) (striking down requirements that signature gatherers wear identification badges and be registered voters) (quoting *Meyer v. Grant*). Importantly, these cases struck down regulations which limited First Amendment freedoms, thus exercising the power of judicial review to enhance individual political freedoms.

In contrast, the decision below held that the people of South Carolina have no right to vote on a hotly contested political question, even when the legislature wishes the people to make that important policy choice. By striking down the referendum on video gaming and then severing the referendum provision from Act 125, the court below managed itself to make the determination which the legislature had not made and wished to submit to the electorate. That action itself bears close scrutiny, for it runs the risk that "[s]triking it down is an act, not of judicial judgment, but of political will." *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting)

As evidenced by the numerous cases involving referenda and initiative, there is no bright-line test for state constraints on First Amendment freedoms. "We have several times said `no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made." *Buckley*, 119 S.Ct. at 642 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

This case is particularly timely. As a recent commentator has noted: "The renewed use of the tools of direct democracy in the 1990s portends even more frequent clashes between the ultra-democracy of direct legislation and ultimate anti-democracy of an unelected and, at the federal

level, virtually unremovable judiciary." Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 12 (1997). Certiorari should therefore be granted.

II. THIS CASE RAISES FUNDAMENTAL JUSTICIABLE QUESTIONS REGARDING THE MEANING OF THE "REPUBLICAN FORM OF GOVERNMENT" REQUIRED OF ALL STATES BY THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION.

The focal point of the Guarantee Clause is the legislative function: that is, the enactment of laws by legislators elected to office by the people. If the clause guarantees anything, it is that the legislative prerogative shall not be impaired—whether by federal legislation (*New York v. United States*, 505 U.S. 144 (1992)) or by the State Constitution. Were a State Constitution to abolish the legislature and provide, for example, that all laws should be decreed by the Governor or the Supreme Court, that State Constitution would surely violate the Guarantee Clause, presenting a justiciable issue of federal constitutional law.

Similarly, where the State Constitution (as interpreted by the State's highest court) prohibits the legislature from performing an inherent legislative function, a justiciable issue arises as to whether that denial of an essential legislative prerogative is so substantial as, in effect, to impair the state's republican form of government. *New York v. United States*, 505 U.S. at 184-85 ("More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.") (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964)). In such a case - and that is this case - the question presented is whether the legislative function at issue (here, the submission of legislation to the electorate for approval or disapproval) is, in

fact, an inherent legislative function, the abnegation of which so infringes on the legislature's ability to perform its function as to violate the guarantee of a republican form of government.[2]

Two diametrically opposed lines of authority have developed, one characterizing the referendum process as an inherent power of any legislature to submit an issue to the electorate for approval or disapproval, and the other striking down such referenda as unlawful attempts to delegate the legislative power to a body (the electorate) other than the legislature.[3] This case affords the Court the opportunity to resolve this vexing and long-running debate which has embroiled so many state statutes (usually dealing with highly controversial issues) in contentious litigation.

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[2] Of course, the ultimate purpose of this guarantee, as with other structural principles of the Constitution such as federalism and separation of powers, is to "'secure[] to citizens the liberties that derive from the diffusion of sovereign power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" *New York v. United States*, 505 U.S. 144, 181-82 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

[3] The term "referenda" is sometimes used to describe both the submission of proposed legislation to the electorate for approval or disapproval (as in this case), and the submission to the electorate of multiple choices among possible legislation, as well as initiatives originating by petition and not passed by the legislature at all. Here, petitioner uses the term "referendum" in its narrower sense i.e., the submission of legislation passed by the legislature for approval or disapproval by the electorate.

A. Referendum as an inherent legislative power

The first line of cases views the legislative power as plenary, limited only by specific prohibitions contained in the State Constitution. An excellent example of this analysis is *Wyatt v. Kundert*, 375 N.W.2d 186 (S.D. 1985), upholding the state legislature's submission to referendum of a bill which would approve the State's entry into a compact regarding the disposal of nuclear waste:

> The South Dakota Constitution, unlike the Constitution of the United States, does not constitute a grant of legislative power. Instead, our constitution is but a limitation upon the legislative power and the legislature may exercise that power in any manner not expressly or inferentially proscribed by the federal or state constitutions. Thus, except as limited by the state and federal constitutions, the legislative power of the state legislature is unlimited. "What the representatives of the people have not been forbidden to do by the organic law, that they may do." "Consequently, in determining whether an act is unconstitutional we search the state and federal constitutions for provisions which prohibit its enactment rather than for grants of such power." A presumption in favor of constitutionality is also accorded any legislative act and that presumption is not overcome until the act is clearly and unmistakably shown to be unconstitutional and no reasonable doubt exists that it violates constitutional principles.

Id. at 190-91 (quoting *State ex rel. Payne v. Reeves*, 184 N.W. 993, 996 (1921)) (internal citations omitted).

The South Carolina Legislature shares the opinion that its legislative authority is plenary in nature. Part V of the statutory scheme provides:

> ...All provisions in this act are enactments of the General Assembly that meet the formalities of an act required under Article III of the Constitution of this State which provides for the legislative power in the government of this State. While Article III does not provide for a referendum as part of the legislative process, neither does it prohibit a referendum in which the result is a certain contingency that determines which parts of an act take effect. As the legislative power of the General Assembly is limited only by that which is specifically prohibited in the Constitution of this State and the Constitution of the United States, the General Assembly finds that the referendum required pursuant to this act is a valid exercise of the legislative power of this State.

(App. 130).

This Court has viewed the submission of legislative enactments to a general referendum as entirely consistent with the legislative power. In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), this Court reversed a holding of the Ohio Supreme Court (similar to the instant case) that a general referendum on zoning changes constitutes an unlawful delegation of legislative power. Stressing that legislative power derives in the first instance from the people who then delegate that power to the legislature, Chief Justice Burger pointed out that the people may reserve to themselves a portion of that power in the form of the right of referendum:

> A *referendum* cannot, however, be characterized as a *delegation* of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the *legislature.*

Id. at 672 (citing The Federalist No. 39 (v. Madison); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969)) (emphasis in original).

Under this analysis, the referendum is not "legislating" at all, but "allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." *Eastlake*, 426 U.S. at 673. Thus, the referendum is a quite different mechanism from attempted delegations of legislative power to administrative agencies. "[T]hese cases involved a delegation of power by the legislature to regulatory bodies, which are not directly responsible to the people; this doctrine is inapplicable where, as here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves." *Id.* at 675; *cf. A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding delegation of legislative power to administrative agencies unconstitutional); *but see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (upholding a Congressional delegation of rulemaking power to administrative agency).

In *Eastlake*, this Court also distinguished two cases, relied on by the Ohio Supreme Court to strike down the referendum, in which the legislature sought to delegate decision-making to a small segment of the public, rather than to the electorate at large:

> The thread common to both decisions is the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a Narrow segment of the community, not to the people at large.

Eastlake, 426 U.S. at 677 (citing *Eubank v. Richmond*, 226 U.S. 137 (1912)).

Relying on *Eastlake*, the Supreme Court of South Dakota also reached the conclusion that the legislature possesses the inherent power to submit an issue to referendum precisely because a referendum is not a legislative act: "As early as 1913, this Court, in *State ex rel. Wagner v. Summers*, 33 S.D. at 50, 144 N.W. at 732, recognized that the 'exercise of the referendum is not an exercise of delegated legislative power; it is in effect the exercise of the veto power. *Wyatt*, 375 N.W.2d at 193. Consequently, the court concluded: "A referendum is not a delegation of legislative power. On the contrary, it is the exercise of the veto power. Plaintiffs' contentions in opposition are not sustainable." *Id.*

B. Referendum as unconstitutional delegation of Legislative power

The opposing view, adopted by the court below, does not see the power of the legislature to submit an issue to the ballot as inherent legislative authority, but rather as its opposite—the delegation of legislative authority to a body (the electorate) which is not authorized to legislate. Under this theory, unless the state constitution specifically authorizes the legislature to submit a matter to referendum, the legislature does not possess that power.

The court below relied heavily on an advisory opinion of the Supreme Court of New Hampshire, advising the legislature that it could not constitutionally submit for referendum two alternative schemes for assessing state taxes:

> One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted [sic] cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.

Opinion of the Justices (Tax Plan Referendum), 725 A.2d 1082, 1091 (N.H. 1999) (citing *State v. Hayes*, 61 N.H. 264, 325 (1881) (quotation omitted)).

Under this analysis, the general electorate is viewed no differently from an administrative agency and, consequently, submission of a legislative matter to referendum to the electorate is forbidden. The court further held:

> The purpose of the bill is to "authorize the legislature to seek the consent of the people, through a binding referendum, for a newly established tax." If the people are to say, by way of popular vote, whether or not an act shall

> become law, they are put in the place of the legislature. The vote of the people becomes the determining factor whether an act shall be the law or not, not simply a contingency upon which certain things are or are not to be done under the law. This would grant the people the "supreme legislative power" that by the constitution is vested in the senate and house of representatives.

Id. at 1092.

The court below adopted, for the state of South Carolina, the rule enunciated by the New Hampshire Supreme Court:

> Like New Hampshire's constitution, this state's constitution is premised upon the philosophy of John Locke and this Court agrees with the statement made by the New Hampshire Supreme Court in 1881, and reaffirmed by that Court this year, that: ". . . By the constitution, legislative power is vested not in the towns, but in the senate and house of representatives. And without a well established ground of exception, the senate and house are as incapable of delegating their legislative power, as the governor and council are of delegating the power of pardon, or the court of delegating the power of deciding the constitutional question raised in these cases. All power is derived from the people, and all magistrates and officers of government are their agents, and at all times accountable to them. And these agents have not a general authority to avoid their official responsibility by relegating their duties to their assignees. If the legislative seats were filled with substitutes, it would not be claimed that a

> bill passed by them was law. The vote of a body of substitutes, assembled in the state-house or elsewhere, is not legislation, unless authorized by a legal construction of the constitution. . . .

Joytime Distributors, at (*See* App. 7) (citing *Opinion of the Justices*, 725 A.2d at 1087) (citing *State ex rel. Pearson v. Hayes*, 61 N.H. 264, 329 (1881) (internal citations and quotations marks omitted))); *see also Gibson County Special School Dist. v. Palmer*, 691 S.W.2d 544 (Tenn. 1985); *Board of Public Works v. Baltimore County*, 421 A.2d 588 (Md. 1980); *In re Municipal Suffrage To Women*, 36 N.E. 488 (Mass. 1894).

Thus, the decision below raises a fundamental question regarding the essence of the republican form of government guaranteed by Art. IV, Sec. 4 of the federal Constitution: Does the state legislature possess, as an essential element of the legislative power, authority to enact a bill which does not become law until voted upon by the general electorate at a referendum, in accordance with the state's established voting procedure? Or, as the court below held, is this power inherently denied to the legislature unless specifically granted to it by the state constitution? Resolution of this issue is of particular importance because the kind of issues generally submitted by the legislature to a general referendum typically concern matters of intense public concern (e.g., nuclear waste, taxation, gambling). This Court should therefore grant certiorari to review and decide this important, unresolved, and urgent issue of constitutional law.

CONCLUSION

For all the above discussed reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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